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Supreme Court of the United States

October Term, 1963

No. [redacted] 152

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,

Defendants-Respondents.

LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Intervenor-Respondent.

On Appeal from the Court of Appeals of the State of New York

APPELLANTS' REPLY BRIEF

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No. 1185

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APPELLANTS' REPLY BRIEF

The principal questions involved in this appeal have been covered in appellants' jurisdictional statement. We submit this reply brief only to comment on several points in defendants-respondents' motion to dismiss appeal, which challenge reply.

Of the cases cited by defendants-respondents in the two complete paragraphs on page six of their motion to dismiss appeal in support of their contentions that (1) the

distinction between owners and tenants drawn by the present tax law is not capricious and (2) the instant tax is constitutional, the following are, we submit, clearly inapposite to the case at bar: *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304 (1914); *Hart Refineries* v. *Harmon*, 278 U. S. 499 (1929); *Armour & Co.* v. *Virginia*, 246 U. S. 1 (1918).

The remainder of the cited cases, we submit, are also not analogous to the instant case and do not support the contentions of defendants-respondents for which they are cited. Unlike the classification—founded upon the distinction between owners and tenants—involved in the case at bar, the classifications in those cases were founded basically on a distinction between a tax on the property, or the holding, manufacturing, producing, or processing of property which is primarily to be sold, as distinguished from that which is not to be sold, to customers of the taxpayer in the ordinary course of his trade or business, as of the time of the imposition of the tax.

Above all else, it is clear from a reading of the above-cited cases that they do not resolve and dispose of the issues presented by this appeal. This conclusion, which is the very essence of appellants' jurisdictional statement, it would seem, is sufficient to satisfy the requirement that an appeal to this Court presents a substantial Federal question.

On the same page (p. 6) of their brief, defendants-respondents set forth the following conjecture as a basis for the classification involved herein:

> "The Legislature may have proceeded on the view that an owner who pays a direct tax on his real property should not also be subjected to this tax. *Klein* v. *Board of Supervisors*, 282 U. S. 19 (1930). * * *"

In the *Klein* case, the Court upheld a Kentucky tax imposed on holders of shares of stock in a corporation,

but excluded from its coverage shares of stock of individual stockholders of a corporation, at least 75% of whose total property was taxable in Kentucky, so long as the corporation paid taxes on all its property in Kentucky. The *Klein* case does not support the argument made by defendants-respondents in the above quoted sentence. Unlike the suggestion made by defendants-respondents in the instant case that a single individual, *viz.*, an owner of real property, ought not to be burdened by an occupancy tax in addition to a direct tax on his real property, the Court in the *Klein* case makes it clear beyond peradventure that it is dealing with two different entities: a corporation as distinguished from its shareholders; and incidentally, two different properties: the property of the corporation and the shares of the stockholders.

On page 7 of their motion to dismiss appeal defendants-respondents deny having made a concession in their brief in the Court of Appeals that the real estate tax is absorbed by the rent paid by tenants, and that the economic impact of a real estate tax and of a tax on occupancy are identical. Appellants have never asserted that any such concession was made by defendants-respondents in their brief. In their brief the defendants-respondents merely assumed the correctness of these propositions for the purpose of argument. But defendants-respondents in their oral argument in the Court of Appeals went further and actually conceded the correctness of these propositions. Defendants-respondents do not deny this. Nor do they deny that in fact the economic impact of a real estate tax and the economic impact of the tax at bar are identical.

On the same page (p. 7) of their motion to dismiss this appeal, defendants-respondents state:

> "We concluded [that portion of the argument in our brief to the Court of Appeals] by showing that acceptance of appellees' [appellants'] economic impact theory would lead to bizarre results."

It may be noted briefly that this statement was framed in the context of an argument based upon the New York Constitution (referred to in appellants' jurisdictional statement at page 9) which is not before this Court. This statement in no way related, and its inclusion in defendants-respondents' motion to dismiss appeal is wholly irrelevant, to the issues presented by this appeal.

The questions presented by this appeal are substantial and they are of public importance. This Court should, we submit, note probable jurisdiction of the case.

Respectfully submitted,

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Dated: July 9, 1964,
New York, N. Y.